IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26854-3-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
NICHOLAS C. HOWELL,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, J. — Nicholas Howell appeals his convictions for one count of second degree malicious mischief and two counts of harassment. He challenges his convictions on several grounds, arguing that: (1) his right to a speedy trial was violated; (2) he received ineffective assistance of counsel; (3) the trial court erred by not allowing him to represent himself at trial; (4) the trial court erred by removing him from the courtroom and continuing the trial by video feed; and (5) insufficient evidence supported his conviction for second degree malicious mischief. Mr. Howell asserts multiple errors occurred at sentencing. We conclude that Mr. Howell's assertions of error are unsubstantiated and that his sentence was correct. Accordingly, we affirm.

FACTS

Mr. Howell was charged in Spokane County Superior Court with two counts of harassment, one count of third degree assault, and one count of second degree malicious mischief.

On July 21, 2007, at approximately 1:27 a.m., Mr. Howell and his uncle, Kim Howell,[1] entered the "Bottom's Up" tavern in Spokane Valley. According to Mack Wilson, one of the bouncers at the tavern, Mr. Howell and his uncle appeared intoxicated when they arrived. After Mr. Howell ordered, he reached behind the bar and took a bottle of tequila. The bouncer told the manager. The manager took back the bottle of tequila. Mr. Howell and his uncle were denied service and told to leave. A second bouncer, Joshua Schiller, moved out from behind the bar to escort the two men outside.

As the pair headed for the door, Mr. Howell struck Mr. Wilson on the shoulder. In response, the bouncer told Mr. Howell to go home. Mr. Howell started swearing at the bouncers and arguing about having to leave.

Mr. Howell's uncle told the bouncer that they were not leaving and blocked the doorway by bracing on the door frame. Mr. Howell continued to insult the tavern staff

[1] We refer to the appellant Nicholas Howell as "Mr. Howell" for clarity.

and his demeanor indicated that he wanted to fight. The bouncer repeatedly ordered Mr. Howell and his uncle to leave.

As Mr. Howell and his uncle tried to force themselves back through the doorway into the tavern, a fight ensued between the tavern staff and Mr. Howell. At some point during the altercation, Mr. Howell hit Mr. Wilson and Mr. Schiller. Mr. Howell and his uncle continued to fight until they were subdued when Mr. Schiller and a bartender placed them in choke holds and took them outside to the parking lot. Tavern staff called the police.

Before officers arrived, however, Mr. Howell and his uncle regained consciousness and continued their belligerent behavior by insulting and swearing at the tavern staff. The bouncers again told the men to leave, but they refused. At that point, Mr. Howell pulled a knife from his front pocket and began to threaten the tavern staff. Mr. Howell told the staff that "if we live in the Valley, he'd find us; and he'd kill us." Report of Proceedings (RP) at 93. When Mr. Howell made the threat, he was looking at the two bouncers, Mr. Wilson and Mr. Schiller.

After the manager came outside and announced that the police were on their way, Mr. Howell and his uncle left in Mr. Howell's vehicle. Deputy Mark Brownell began a search of the area. Shortly thereafter, he located the vehicle and initiated a stop.

Mr. Wilson and Mr. Schiller affirmatively identified Mr. Howell as the man who had made the threats earlier that night. Mr. Howell was arrested and transported to the jail. Throughout his contact with law enforcement, Mr. Howell was belligerent and uncooperative. On the way to the jail, Mr. Howell spit in the back of the patrol car. Deputy Brownell testified that Mr. Howell, in fact, spit in the vehicle six times, including on the shield and on the floor.

Deputy Brownell testified that after he left the jail, he was unable to do any more transports due to the contamination. He returned to the Spokane Valley precinct, where the vehicle was taken out of service and secured with biohazard tape. A professional cleaning service decontaminated the patrol car on July 23. The cost of the decontamination was $95.

Mr. Howell and his uncle testified at trial and each of them denied nearly all of the State's case.

Mr. Howell was convicted of one count of second degree malicious mischief and two counts of harassment. The trial court imposed high-end standard range sentences on all counts. This appeal followed.

ANALYSIS

Speedy Trial. Mr. Howell first contends that his right to a speedy trial under

CrR 3.3 was violated. Mr. Howell was arraigned on September 12, 2007. Trial was originally scheduled for November 5. However, on November 6, the court entered an order continuing trial until November 19. According to the order, the reasons listed for the continuance were: "prosecutor unavailable due to vacation; currently no judges available for current week and not enough time left to complete trial this week; no prejudice to defense and good cause for next week." Clerk's Papers (CP) at 141.

On November 20, the trial was continued a second time to November 26. The reasons provided were: "courtroom unavailable due to length of trial, continued by judge in administration of justice; no prejudice to defense, good cause." CP at 142. The trial commenced on November 26.

CrR 3.3 generally requires the State to bring an incarcerated criminal defendant to trial within 60 days of arraignment; if not, the trial court will dismiss the case with prejudice. CrR 3.3(b)(1), (h). There are, however, several exceptions to this rule. Under CrR 3.3(e)(3), continuances are excluded from computing time for trial. CrR 3.3(f)(2) provides that "the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." Additionally, CrR 3.3(b)(5) provides that "[i]f any period of time is excluded pursuant to section (e), the allowable

time for trial shall not expire earlier than 30 days after the end of that excluded period."

Here, the speedy trial time period ended on November 6, 2007, one week before the original time set for trial expired. Due to the continuances, the time between November 6 and when trial commenced on November 26 does not count toward the 60-day time for trial period. On this record, Mr. Howell fails to show that his CrR 3.3 speedy trial rights were violated.

Ineffective Assistance of Counsel. Second, Mr. Howell contends that he received ineffective assistance of counsel because his trial counsel refused to argue that RCW 9A.46.010 requires repetitive acts and failed to request appropriate jury instructions. He also argues that trial counsel failed to adequately interview the State's witnesses. Mr. Howell alleges that his attorney had lunch with the prosecutor and announced that his client was guilty. Mr. Howell's ineffective assistance claim is without merit.

To prevail on a claim of ineffective assistance of counsel, a defendant must prove that (1) defense counsel's conduct was deficient because it fell below an objective standard of reasonableness, and (2) the deficient conduct was prejudicial. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). "A failure to establish

either element of the test defeats the ineffective assistance of counsel claim." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004). Reviewing courts engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This presumption will be rebutted only by a clear showing of incompetence. *State v. Varga*, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

Here, Mr. Howell claims that defense counsel was having lunch with the prosecutor and announced that Mr. Howell was guilty. Mr. Howell's version of the facts is incorrect. According to the record, defense counsel was standing in line at the cafeteria with a paralegal from his office, not a prosecutor, during the incident in question. One of the jurors in the case was in line behind defense counsel and he did not see the juror because his back was turned to her. In addition, the juror's badge was covered by her purse. Defense counsel admitted that he was briefly discussing the case with the paralegal before he noticed the juror's presence. He clarified for the record that he did not express an opinion as to his client's guilt: "I may have expressed the level of evidence." RP at 377.

Contrary to Mr. Howell's claims, the prosecutor was not involved in whatever exchange took place and the juror was replaced with an alternate. The entire jury was

asked, one by one, whether the affected juror made any statements to them or in their presence concerning what she had overheard in the cafeteria. The trial court noted that the only juror who heard anything specific was juror 11, who relayed that the affected juror told him that she overheard two attorneys talking and "something about it wasn't good for the defense." RP at 393.

After further questioning of the juror, the trial court was satisfied that the juror could set the comments aside and remain fair and impartial. The court also noted that juror 11 was willing to follow the court's instructions and make a decision based strictly on the evidence and law that was provided at trial. Consequently, the trial court denied Mr. Howell's motion for a mistrial. Mr. Howell does not appeal the denial of that motion; rather, he argues only that defense counsel's comments created a conflict of interest.

Mr. Howell also claims that defense counsel was ineffective because he did not call more witnesses at trial or ask more questions. However, other than this broad assertion, Mr. Howell provides no information regarding who the additional witnesses were or what testimony they would have provided. But an attorney need not advance every argument, regardless of merit, urged by the appellant. *In re Pers. Restraint of Frampton*, 45 Wn. App. 554, 562 n.8, 726 P.2d 486 (1986) (citing *Jones v. Barnes*, 463

U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)).

Regarding any additional questions, it is clear from the record that Mr. Howell wanted questions asked which his defense counsel correctly determined were inappropriate. Throughout the proceedings, Mr. Howell's dissatisfaction with defense counsel was based on the fact that counsel "refused to bring the RCW 9A.46.010 of the harassment [statute] into trial." Br. of Appellant at 22.

RCW 9A.46.010 is the statement of legislative intent for harassment, chapter 9A.46 RCW, and is not a controlling statute. Based on language in RCW 9A.46.010, Mr. Howell repeatedly insisted at trial that harassment must be repetitive for a crime to occur. The actual harassment statute, RCW 9A.46.020, does not require multiple instances. The trial court attempted to correct Mr. Howell on several occasions, telling Mr. Howell that he was relying on the wrong law. However, as the State points out, the record is replete with instances of where Mr. Howell felt his legal knowledge exceeded even that of the trial judge. Mr. Howell adamantly refused to accept that he was misinterpreting the law and, on appeal, he continues to insist that "harassment is a repetitive offense." Br. of Appellant at 22.

As stated above, RCW 9A.46.020 does not require multiple offenses. Defense counsel was not deficient by refusing to argue an incorrect statement of the law. Further,

there was nothing in the jury instructions to which defense counsel could have successfully objected. In conclusion, Mr. Howell has failed to overcome the presumption that defense counsel provided effective representation. Thus, his claim of ineffective assistance of counsel is without merit.

Self-Representation. Third, Mr. Howell contends that the trial court erred by failing to grant his oral motions to discharge court-appointed counsel and proceed with self-representation.

Criminal defendants have a constitutional right to waive assistance of counsel and to represent themselves at trial. *State v. DeWeese*, 117 Wn.2d 369, 375, 816 P.2d 1 (1991). However, the right to self-representation is not absolute. *Id*. at 377. Before a defendant may represent himself, the trial court must establish that the defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of the right to counsel. *Id*. This requirement extends to a defendant's choice to represent himself rather than remain with current appointed counsel. *Id*.

In addition, the request for self-representation must be both timely made and stated unequivocally. *State v. Stenson*, 132 Wn.2d 668, 737, 940 P.2d 1239 (1997). "[A] defendant's desire not to be represented by a particular court-appointed counsel does not by itself constitute an unequivocal request by the defendant for self-representation."

DeWeese, 117 Wn.2d at 377. Moreover, if the defendant's motion to proceed pro se is not timely, the defendant waives his right to self-representation and the matter is left to the discretion of the trial court. *Id*. In exercising its discretion to grant or deny a defendant's request to proceed pro se, the trial court may consider whether the request is made for purposes of delay or to gain tactical advantage, and whether the lateness of the request may hinder the administration of justice. *See Stenson*, 132 Wn.2d at 738 (quoting *People v. Mogul*, 812 P.2d 705, 708-09 (Colo. App. 1991)). "A defendant may not manipulate the right to counsel for the purpose of delaying and disrupting trial." *DeWeese*, 117 Wn.2d at 379 (citing *State v. Johnson*, 33 Wn. App. 15, 651 P.2d 247 (1982)).

The record in this case shows that Mr. Howell's first request for self-representation came after the CrR 3.5 hearing and just prior to the jury being brought in. Mr. Howell's interest in proceeding pro se was based not so much on his desire to represent himself as his desire not to be represented by his appointed attorney. Mr. Howell announced: "[Y]ou're not representing me. That's all I have to say." RP at 52. At that point, the trial court asked: "What do you want me to do, Mr. Howell?" Mr. Howell replied: "Well, it looks like we're not going to trial today, your Honor." RP at 52. In response to further questioning by the trial court, Mr. Howell admitted he would

need another day or two if he was going to have to represent himself. When Mr. Howell continued to insist on representing himself, the following exchange took place:

> THE COURT: Oh, okay. Are you going to represent . . . yourself?
> THE DEFENDANT: He's not representing me. If he's not representing me, then, so be it. I'll represent myself.
> THE COURT: All right. Do you understand what you're doing?
> THE DEFENDANT: I guess I will.
> . . . .
> THE COURT: Okay. So, you think you can represent yourself well in front of this jury?
> THE DEFENDANT: We'll find out.
> THE COURT: Okay. Do you know the rules of evidence?
> THE DEFENDANT: Your Honor, I'm within my rights. I don't feel like answering your questions any more.
> THE COURT: You don't want to answer my questions.
> THE DEFENDANT: Nope.
> THE COURT: All right.
> . . . .
> THE COURT: —I'm not going to allow you to represent yourself. You won't answer my questions so I can't make a decent inquiry as to your ability to represent yourself. So, Counsel, you'll have to continue to represent him.

RP at 52-54.

Mr. Howell repeatedly threatened to disrupt the trial if he was not allowed to represent himself. When the trial court directly asked Mr. Howell if he would behave himself, he replied: "We'll see." RP at 54. At one point during the exchange, Mr. Howell asked to be removed from the courtroom and told the court that continuing with the trial was "not gonna happen." RP at 54. After the court stated that it would be

proceeding with the trial, Mr. Howell stated: "Okay. Well, when the jury gets here, they'll know what's going on, too. Bring them in here. We'll all act—we'll all look like fools." RP at 55.

The record shows that Mr. Howell's request was made with the purpose of disrupting and delaying trial. The trial court also noted for the record that Mr. Howell engaged in a pattern of disrupting the proceedings and attempting to delay the trial. After several unsuccessful attempts to engage Mr. Howell in a colloquy regarding self-representation, the trial court stated:

> THE COURT: . . . Mr. Howell has been unwilling to proceed with the appropriate methodology in trying to determine whether he's making a waiver of counsel knowingly, intelligently, and voluntarily. I'm just not able to get the information I—I need to be able to—to make that determination.
>
> . . . .
>
> As far as I'm concerned, the issue of him representing himself has been determined by Mr. Howell's own behavior. I can't make a determination that he's making a knowing, intelligent waiver. I've said that time and again, and I've tried to make every opportunity. Mr. Howell has chosen this path, and that's what's going to happen at this stage.
>
> Mr. Reich, you're going to continue to represent Mr. Howell through the balance of this trial.

RP at 149-50.

On this record, the trial court did not abuse its discretion by refusing to grant Mr. Howell's request to discharge counsel and represent himself.

Removal from the Courtroom. Fourth, Mr. Howell contends that the trial court denied him of his "open trial rights" by removing him from the courtroom and allowing him to participate in his trial only by video feed. Br. of Appellant at 2. The State responds that Mr. Howell attempted in every possible way to disrupt, delay, and generally create chaos during the trial. The State argues that the reasons the trial court elected to continue the trial by video are apparent from the record, which is replete with examples demonstrating that Mr. Howell could not be controlled and showing the "interruptions, outbursts, insults to the trial judge, disruptions to the trial, petulant behavior, immature behavior, disruptive requests and more." Br. of Resp't at 14. The State argues that because Mr. Howell refused to control himself, the trial court was forced to resort to alternative measures. We agree.

A similar argument was rejected by the Washington Supreme Court under nearly identical facts in *DeWeese*. Larry DeWeese was removed from the courtroom following a series of outbursts in which he interrupted the State's direct examination of witnesses and made prejudicial remarks in the presence of the jury. *DeWeese*, 117 Wn.2d at 380. Prior to his removal, the trial court repeatedly warned Mr. DeWeese that it would take action unless he controlled his behavior. *Id*. In addition, Mr. DeWeese was offered the opportunity to remain in court if he could adhere to the rules and cease his interruptions

and disruptions. *Id*. at 381. Mr. DeWeese failed to take advantage of that opportunity and was removed from the courtroom and taken to another location where he could follow the trial by video monitor. *Id*. The court held that the trial court's decision to remove Mr. DeWeese from the courtroom and continue the trial in his absence was not error. *Id*. at 374.

In reaching its conclusion, the *DeWeese* court noted that a defendant's right to be present at trial is not an absolute right. *Id.* at 381. "It is subject to either the defendant voluntarily absenting himself from proceedings or the removal of the defendant from the courtroom due to disruptive behavior." *Id*. The decision to remove a defendant is within the discretion of the trial court. *Id*. Nonetheless, the least severe means of maintaining order in the courtroom is preferable. *Id*. at 380. In *DeWeese*, the court concluded that Mr. DeWeese's removal from the courtroom was within the trial court's discretion in maintaining fair and orderly proceedings, noting there is "no place in the courtroom for obnoxious or obstructionist behavior." *Id*. at 382.

Here, as in *DeWeese*, Mr. Howell engaged in a pattern of being disruptive throughout the proceedings. In fact, problems with Mr. Howell's disruptive behavior arose during the CrR 3.5 hearing on November 26, 2007, when the trial court attempted to correct Mr. Howell's misunderstanding of the harassment statute. During his outburst,

Mr. Howell repeatedly told the trial court that he wanted to be removed from the courtroom. Mr. Howell insisted on arguing his theory of the law, and told the court: "I'll be making my objections throughout the whole case." RP at 49. The trial court advised Mr. Howell that trial would proceed and that the jury would be taking his behavior into account. At that point, Mr. Howell announced: "I'm not listening to you, your Honor. I'm not listening to you at all." RP at 50.

A short time later, Mr. Howell refused to engage in a colloquy with the trial court concerning self-representation, but nonetheless indicated that he would disrupt the trial if appointed counsel continued to represent him. Mr. Howell refused to assure the court that he would behave himself if his handcuffs were removed, at which point both transport guards expressed concern that Mr. Howell would be assaultive. The trial court considered, at length, the option of placing Mr. Howell in additional restraints, and stated that it would consider trying the case in absentia as a last resort. The trial court subsequently asked Mr. Howell: "[I]f I take the shackles off, are you going to attack anybody?" RP at 63. Mr. Howell replied: "I'm going to lay on this floor until I'm removed from this courtroom." RP at 63.

Before the jury was brought in, the trial court advised Mr. Howell not to be disruptive during trial. The trial court also cautioned Mr. Howell several times that his

disruptive behavior would be viewed negatively by the jury and could result in convictions against him. The trial court again asked Mr. Howell if he was going to have outbursts, to which Mr. Howell replied: "Possibly because I'll be saying objections to what my attorney is saying if he's not going to say what I want him to say. . . . You might have to shackle my mouth shut to stop me from doing that." RP at 69-70.

The trial commenced later that afternoon and the State called Mr. Wilson as its first witness. Mr. Howell interrupted Mr. Wilson's testimony, and the trial court had the jury removed from the courtroom. The trial court again warned Mr. Howell that the jury would be considering his outbursts. The following morning—before the State could call its next witness—Mr. Howell had another outburst, this time accusing the witness of perjury. The jury again had to be taken out.

At that point, the trial court advised Mr. Howell that if he continued to disrupt the proceedings, he would be excluded from the courtroom and required to participate through a video system. Despite being warned of the consequences of disrupting the trial, and acknowledging that he understood those consequences, Mr. Howell admitted that he intended to continue his disruptive behavior by being outspoken before the jury. The court then determined that Mr. Howell's behavior was too disruptive to continue the trial with him present, stating:

> I've given Mr. Howell an opportunity to—on numerous occasions to

> tell me that he won't be disruptive in court. He doesn't consider it being disruptive. The Court does. I am going to exclude him from the courtroom at this time and set up a video courtroom scenario.

RP at 149. The trial court noted that it would reconsider if Mr. Howell was willing to assure the court that he would not be disruptive, but that "[h]e's choosing not to do that." RP at 149. Mr. Howell participated in the trial by way of a two-way television connection, which included a private communication with defense counsel.

In light of Mr. Howell's disruptive behavior, his removal from the courtroom was within the trial court's discretion. The trial court pursued the least severe means of maintaining order and provided Mr. Howell with multiple opportunities to remain in court if he could cease his outbursts and disruptions. Because Mr. Howell failed to take advantage of this opportunity, he cannot now complain.

Sufficiency of the Evidence. Fifth, Mr. Howell contends that there is insufficient evidence to support his conviction for second degree malicious mischief. Mr. Howell cites to *State v. Hernandez*, 120 Wn. App. 389, 85 P.3d 398 (2004) in which this court held that spitting in a patrol car was insufficient to support a conviction for second degree malicious mischief. The State maintains that *Hernandez* is distinguishable.

The standard for review when sufficiency of the evidence is challenged is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt when the evidence is viewed in the light most favorable to the State. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence to support a criminal conviction admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences must be drawn in favor of the State and most strongly against the defendant. *Id.* A reviewing court gives deference to the trier of fact on the issues of conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996).

In the present case, sufficient evidence supports Mr. Howell's conviction. Under RCW 9A.48.080(1), a person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

> (b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

In *Hernandez*, Roberto Hernandez was found guilty of second degree malicious

mischief as a result of spitting in a patrol car. *Hernandez*, 120 Wn. App. at 390. The facts show that Mr. Hernandez was belligerent and uncooperative when he was handcuffed and placed in the back seat of the patrol car. *Id*. at 390-91. On the drive to the police station, Mr. Hernandez screamed, cursed, and spit several times—twice on the shield partition between the front and back seats, and twice on the floor of the vehicle. *Id*. at 391. After dropping Mr. Hernandez off at the juvenile detention facility, the officer spent about 15 minutes cleaning the back seat of his patrol car with disinfectant. *Id*. Mr. Hernandez was subsequently found guilty of second degree malicious mischief. *Id*.

On appeal, Mr. Hernandez argued that the State failed to prove that he tampered with the patrol car or damaged it sufficiently to support the charge. *Id.* This court agreed, holding that "the spittle did not constitute knowing and malicious damage or tampering that substantially risked impairment of the police car's service to the public." *Id.* at 390. In reaching its conclusion, this court noted that there was insufficient evidence that "Mr. Hernandez knowingly and maliciously damaged or tampered with the police vehicle or that he consequently created a substantial risk of interruption or impairment of its service to the public." *Id*. at 392. The court noted that Mr. Hernandez "did not disrupt emergency services by physically manipulating a device crucial to those services." *Id*.

We agree with the State that *Hernandez* is factually distinguishable. As the State

points out, several years have passed since *Hernandez* was decided in 2004 (with the incident occurring in 2002), and the general awareness of biohazard dangers has increased since then. Deputy Brownell's testimony shows that spittle is considered a body fluid and is, therefore, treated as a potential hazard.

Deputy Brownell testified that after he left the jail, he was unable to safely transport anyone else in the vehicle because of the contamination. He immediately returned to the precinct and the vehicle was then taken out of service. Deputy Brownell parked the vehicle in a secured lot and took steps to seal the car with biohazard tape. He also put a sign on the dashboard that the vehicle was out of service due to "bodily contamination." RP at 224. The deputy confirmed at the trial that he followed standard procedure with regard to this incident.

It was clear from the deputy's testimony that the vehicle could not be used until it was decontaminated. In this case, the decontamination was done by a professional cleaning company on July 23. Mr. Howell's actions in spitting six times in the police car caused it to be out of service for two days. This time included, at a minimum, the remainder of Deputy Brownell's shift and the following shift. In contrast, the patrol car in *Hernandez* was returned to service within 15 minutes. As such, there was minimal interruption, as opposed to the "substantial risk of interruption or impairment of service

rendered to the public" that RCW 9A.48.080(l)(b) requires.

In conclusion, Mr. Howell created a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle under RCW 9A.48.080(l)(b). It is undisputed that the use of the patrol car was interrupted. Under these facts, the act of taking the patrol car out of regular use by creating a biological hazard is sufficient to establish second degree malicious mischief.

Sentence. Lastly, Mr. Howell assigns error to various aspects of sentencing. Mr. Howell claims that the trial court erred by sentencing him longer on each of the misdemeanor convictions for harassment than on the felony conviction for second degree malicious mischief. He also claims that the trial court erred by failing to sentence him within 40 days of the verdict. In his appellate brief, however, Mr. Howell provides no argument addressing these alleged errors.

It is well established that unargued assignments of error in an opening brief are deemed abandoned and are not open to consideration on their merits. *State v. Veltri*, 136 Wn. App. 818, 821-22, 150 P.3d 1178 (2007). An appellant proceeding pro se is bound by the same rules of procedure and substantive law as an attorney. *In re Pers. Restraint of Bonds*, 165 Wn.2d 135, 143, 196 P.3d 672 (2008). Since these assignments of error are not supported by argument or citation to authority, we deem them abandoned.

We affirm the convictions for one count of second degree malicious mischief and two counts of harassment.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, J.

WE CONCUR:

_____ _____
Schultheis, C.J. Brown, J.